STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2007
v	No. 269825 Oakland Circuit Court
GARY HERBERT HAGADORN, Defendant-Appellant.	LC No. 2005-204949-FH

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of operating a vehicle under the influence of intoxicating liquor causing serious impairment of a body function, MCL 257.625(5). He was sentenced to two years' probation with the first year in jail. We affirm.

I. FACTS

Defendant's conviction arises out of a motor vehicle accident that occurred on July 1, 2005. Christopher Davis was driving a motorcycle on Ortonville Road/M-15 at approximately 7:30 p.m., when defendant's truck pulled out of the Boat Bar parking lot in front of him. The motorcycle collided with the truck, and Davis slid across the road. Davis was unable to get up and suffered serious injuries, including a broken leg. Defendant admitted to Deputy James Willyard at the scene that he had been drinking, and Deputy Willyard smelled intoxicants on defendant's breath. Defendant also appeared flushed, and his speech and movements were slow and deliberate. DataMaster breathalyzer tests revealed breath alcohol levels of 0.13 and 0.14.

II. ADMISSIBILITY OF EVIDENCE

A. Preliminary Breath Test

Defendant first argues that the trial court erred by admitting evidence of the result of his preliminary breath test ("PBT"), thus denying him his right to due process and a fair trial as well as his right of confrontation. We disagree.

1. Standard of Review

We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Babcock*, *supra* at 269. However, because defendant failed to object to the admission of the evidence based on the constitutional grounds that he now asserts on appeal, his constitutional arguments are not preserved for appellate review, and our review of those issues is thus limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

2. Analysis

Defendant relies on *People v Keskinen*, 177 Mich App 312; 441 NW2d 79 (1989), for the proposition that PBT results are inadmissible. There, this Court interpreted language very similar to current MCL 257.625a(2)(b)(i), which provides:

> (b) The results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:
>
> (i) To assist the court or hearing officer in determining a challenge to the validity of an arrest. This subparagraph does not limit the introduction of other competent evidence offered to establish the validity of an arrest.

In *Keskinen*, *supra* at 319, this Court determined that the Legislature intended the language at issue, contained in former MCL 257.625h(3), to address challenges brought in the form of pretrial motions to dismiss based on an alleged illegal arrest. This Court stated that because a jury has no role in determining the validity of an arrest, the Legislature did not intend that evidence admissible solely for such a purpose be divulged to a jury during a criminal trial. *Id.*

Defendant's reliance on *Keskinen* is misplaced because the results of his PBT were not revealed to the jury. Rather, in response to a series of questions that defense counsel posed to Deputy Willyard, implying that there was no justification for defendant's arrest, the following colloquy ensued:

> *Q*. [by the prosecutor] Deputy, I was asking you, you did include the justification for your--the arrest in your report?
>
> *A*. [by Deputy Willyard] Yes, sir.
>
> *Q*. And in fact, that was based on an additional test you gave the defendant; is that correct?
>
> *A*. Yes, sir.
>
> *Q*. And based on that test, did you conclude the defendant was, in fact, intoxicated?

A. Yes, sir.

The trial court allowed this questioning because defense counsel's questioning of Deputy Willyard implied that there was no justification for defendant's arrest. The trial court, however, specifically did not allow the prosecutor to ask Deputy Willyard the result of defendant's PBT and the result was not admitted. Moreover, the prosecutor did not refer to the "additional test" given to defendant as a PBT, and the jury was not otherwise apprised that the additional test was in fact a PBT. Accordingly, the trial court did not abuse its discretion by admitting evidence of defendant's PBT, contrary to MCL 257.625a(2)(b)(i), and because no abuse of discretion occurred, defendant cannot establish plain error affecting his substantial rights with respect to his constitutional claims. *Carines*, *supra* at 763-765.

B. Datamaster Test & Logs

Defendant next argues that the trial court erroneously admitted into evidence his DataMaster test results, the DataMaster logs, and that the admission of the logs violated his rights to confrontation. We disagree.

1. Standard of Review

Again, we review a trial court's decision regarding the admission of evidence for an abuse of discretion. *Bauder*, *supra* at 179. Further, this Court reviews de novo a trial court's ultimate ruling on a pretrial motion to suppress evidence. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

2. Analysis

Defendant contends that the failure to comply with administrative regulations regarding the DataMaster machine precluded admission of the DataMaster test results. Under MCL 257.625a(6)(a), the amount of alcohol in a driver's breath, as demonstrated by chemical breath analysis, is admissible in a criminal proceeding. This Court has recognized, however, that "test results must be both relevant and reliable." *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). Following our Supreme Court's decision in *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), this Court held that the only prerequisite to the admission of chemical test results is a threshold relevancy requirement. *People v Campbell*, 236 Mich App 490, 506; 601 NW2d 114 (1999). Moreover, in *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998), this Court stated that "there is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated." Rather, suppression "is required only when there is a deviation from the administrative rules that call[s] into question the accuracy of the test." *Fosnaugh*, *supra* at 450.

Here, no evidence was presented calling into question the accuracy of the DataMaster test. Deputy Daniel Manier, a certified DataMaster operator, performed the test on defendant and testified that the particular machine used was checked regularly for accuracy. The sheriff's department complied with the administrative regulations requiring that the machine be checked on a weekly basis and every 120 days, the latter test to be performed by a Class IV operator of the machine. The department also maintained logs regarding the simulated tests of the machine, which were admitted into evidence. Further, Deputy Manier observed defendant for 15 minutes

before the test, as the administrative rules required, to determine whether he had anything in his mouth that would contaminate the test results. Deputy Manier did not observe anything that would have interfered with the test. Although Deputy Manier did not warn defendant against burping and spent approximately three minutes inputting data into the machine while observing defendant, these factors did not call into question the accuracy of the test absent evidence that defendant regurgitated or otherwise engaged in any act that could have interfered with the accuracy of the test results. Accordingly, the trial court did not err by failing to suppress the DataMaster test results. *Fosnaugh, supra* at 450.

Defendant also argues that the DataMaster logs were not admissible as business records under MRE 803(6), which provides that the following is excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The business-records exception to the rule against hearsay is "based on the inherent trustworthiness of business records." *People v Jambor* (*On Remand*), 273 Mich App 477, 482; 729 NW2d 569 (2007). Trustworthiness is undermined, however, "and can no longer be presumed when the records are prepared in anticipation of litigation." *Id.*

Here, the sheriff's department maintained the logs in the regular course of business as the administrative DataMaster regulations required. In addition to the weekly tests conducted on the machine, the regulations required a Class IV manufacturer's representative to test the machine every 120 days. Deputy Manier testified that log entries were made at the time that the simulated tests were conducted. He further testified that if the logs were not intact, he would not have performed a test on a person because the machine may not be working. Although Deputy Lewis Tyler testified that the DataMaster logbooks are sometimes presented at trials, the evidence showed that the logs are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such a log. Therefore, the logs were properly admitted under MRE 803(6).

Defendant also argues that the results of the simulated tests did not constitute "acts, transactions, occurrences, or events" under MRE 803(6) and thus should not have been included in the logs admitted. However, we conclude that the results did constitute "conditions, opinions, or diagnoses," which are contemplated in MRE 803(6). In addition, defendant offers no evidence showing that the log entries were not made contemporaneously with the administration of the tests. Moreover, contrary to defendant's double hearsay argument, the logs were not admitted for the purpose of establishing that other officers administered tests on the machine, but rather, to establish that routine tests were conducted to ensure the machine's accuracy. Further,

the admission of the logs did not require witnesses to vouch for the accuracy of other officers' work, as defendant contends.

Defendant further argues that *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004), prohibited admission of the DataMaster logs without the opportunity to confront Marvin Guyer, the Class IV operator who conducted the 120-day tests on the machine. *Crawford* held that testimonial statements of a witness not present at trial are barred unless the witness is unavailable to testify, and the defendant had a previous opportunity for cross-examination. *Id.* at 53-54. This Court recently addressed an issue similar to that which defendant now argues in *Jambor, supra* at 479, 486-488, which involved fingerprint cards of fingerprints lifted from a crime scene. This Court noted that in *Crawford*, *supra* at 56, the United States Supreme Court recognized that business records are not testimonial. *Jambor, supra* at 487. The *Jambor* Court concluded that the fingerprint cards were not testimonial because they were admissible under the business-records exception to the rule against hearsay. *Id.* Because the DataMaster logs in the instant case were also properly admitted under the business-records exception to the hearsay rule, they likewise were not testimonial and *Crawford* is not implicated. The cases that defendant cites on appeal are distinguishable in that the laboratory reports at issue in those cases pertained to particular suspects. In the instant case, however, the DataMaster logs did not pertain to defendant, but were maintained merely as a record evidencing the routine testing of the machine.

C. Discovery Violation

Defendant next contends that the trial court abused its discretion by excluding from evidence two different versions of DataMaster log entries for August 2005, resulting in the denial of his rights to confrontation, due process, and a fair trial. We disagree.

1. Standard of Review

Again, we review a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *Bauder*, *supra* at 179. In addition, a trial court has discretion regarding discovery violations, and we review for an abuse of discretion a trial court's decision regarding the appropriate remedy for a discovery violation. MCR 6.201(J); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

2. Analysis

During trial, defendant sought to admit two different versions of DataMaster log entries for August 2005. The trial court sustained the prosecutor's objection on the basis that, pursuant to a pretrial order, defendant was required to turn over to the prosecutor any exhibit that he intended to introduce at trial. Although MCR 6.201(J) specifically grants trial courts discretion to disallow proposed evidence because of discovery violations, the exclusion of otherwise admissible evidence is an extremely severe sanction that should be limited to egregious cases. *People v Taylor*, 159 Mich App 468, 482-483; 406 NW2d 859 (1987).

Notwithstanding the discovery violation, the trial court did not abuse its discretion by excluding the evidence because defendant was unable to lay a proper foundation for admitting the alternative version of the August 2005 DataMaster log entries.[1] MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Further, MRE 901(b)(1) states that authentication may be accomplished by "[t]estimony that a matter is what it is claimed to be." Defendant sought to admit a version of the August 2005 DataMaster log entries that did not contain entries reflecting simulated tests conducted on August 10, 17, and 22, 2005. Deputy Tyler testified, however, that he did not know where defendant's proposed alternative exhibit came from and could not vouch for the veracity of the document. Although the trial court did not exclude the exhibit based on lack of foundation, this deficiency rendered the evidence inadmissible notwithstanding the discovery violation. We will not reverse where a trial court reaches the correct result for the wrong reason. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

In any event, defendant was able to question both Deputy Tyler and Rick Swope regarding the discrepancies between the two versions of the August 2005 DataMaster log entries. Therefore, the jury was apprised of the discrepancies absent the admission of the alternative version of the log entries. Moreover, defendant's questioning of Deputy Tyler focused on the absence of an August 10, 2005, log entry reflecting a simulated test conducted on that date. This discrepancy would not have cast doubt on the results of defendant's test conducted more than one month earlier, on July 1, 2005. As such, even if the trial court abused its discretion by refusing to admit the proposed evidence, the error was not outcome determinative.

III. PROSECUTORIAL CONDUCT

Defendant also contends that the prosecutor committed misconduct and denied him his rights to confrontation, due process, and a fair trial by arguing to the jury during closing argument that he was intoxicated based on the PBT result. Again, we disagree.

A. Standard of Review

Defendant did not object to the prosecutor's argument on any basis during trial. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-765.

B. Analysis

In response to defense counsel's argument that Deputy Willyard failed to conduct a thorough investigation to determine whether defendant was intoxicated, the prosecutor argued as follows:

[1] The version of the August 2005 DataMaster log entries on which the prosecutor relied had already been admitted into evidence in the prosecutor's case-in-chief.

> The defendant is blaming everyone else. He blames Deputy Willyard also for not giving field sobriety tests. Of course, defense counsel still seems to be ignoring the fact, he never asked the deputy about the test he did give him. The deputy told you, yeah, I did give him a test, I knew he was intoxicated. He just wants to ignore that.

Defendant maintains that the prosecutor's argument was improper because evidence of the PBT was inadmissible. As previously discussed, the trial court did not admit evidence of the PBT result, but rather, Deputy Willyard merely referenced a "test" pursuant to which he concluded that defendant was intoxicated. We have determined that this evidence was properly admitted, and the prosecutor's closing argument was based on this evidence. Moreover, the prosecutor's comments must be considered in light of defense counsel's argument, and, even if improper, a remark may not constitute an error requiring reversal if it was made in response to defense counsel's comments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Therefore, even if the prosecutor's remarks were improper, defendant has failed to establish plain error because they were made in response to defense counsel's argument.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to support his conviction because no evidence showed that Davis suffered a serious impairment of a body function. We again disagree.

A. Standard of Review

When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

B. Analysis

Defendant contends that the definition of "serious impairment of a body function" articulated in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), should control this case, or, alternatively, that this Court should convene a special panel to ascertain the meaning of that term. However, under MCL 257.1, the definition of "serious impairment of a body function" articulated in MCL 257.58c governs this case. MCL 257.1 provides:

> The following words and phrases as defined in this chapter and as herein enumerated when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in this chapter.

MCL 257.58c supplies a nonexhaustive list of definitions of "serious impairment of a body function" applicable to the Motor Vehicle Act; therefore, a court may not look to other interpretations of that term and must apply the meanings of the term as expressly defined. *People v Thomas*, 263 Mich App 70, 75; 687 NW2d 598 (2004). MCL 257.58c states in pertinent part:

"Serious impairment of a body function" includes, but is not limited to, 1 or more of the following:

(a) Loss of a limb or loss of use of a limb.

* * *

(h) A skull fracture or other serious bone fracture.

Here, Davis suffered the loss of use of a limb and a serious bone fracture. During the accident, his tibia and fibula in his right leg were shattered, necessitating surgery to place a rod and screws in his leg. He was unable to walk for approximately two weeks. We note that in order to satisfy MCL 257.58c(a), the loss of use of a limb need not be long lasting or permanent. *Thomas*, *supra* at 77. Further, at the time of trial, six months after the accident, Davis was still using a cane, wearing a brace on his leg, and was scheduled to undergo surgery to bring the bones in his leg closer together. Moreover, Davis's doctor, Dr. Michael Sorscher, testified that Davis's fracture was "comminuted," or that the bones were broken into many little pieces, and that the two main pieces were severely displaced. He further agreed that Davis's fractures could be characterized as "a pretty bad break." Accordingly, the evidence was sufficient to constitute a serious impairment of a body function as that term is used in MCL 257.58c.

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello